United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-7213

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 75-7213

LUIS FUENTES,

Plaintiff-Appellant,

Vs.

ADOLPH ROHER, RICHARD LEE PRICE, MARTIN RUBIN, JEROME GOODMAN,

Defendant-Appellees,

-and-

GEORGINA HOGGARD, JANICE WONG, CARMEN BARRETO, HENRY RAMOS, AND CAROLYN KOZLOWSKY,

Defendants-Appellants.

On Appeal From the United States District Court
For the Southern District of New York

BRIEF FOR DEFENDANTS-APPELLANTS

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Brooklyn, New York 11211
Attorney(s) for Defendants-Appellants Hoggard, Wong, Ramos, and Barreto

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BRIEF FOR DEFENDANTS-APPELLANTS

Statement of Questions Presented

Did the District Court exceed its authority in ordering defendants-appellants Community School Board members to either appoint a

hearing examiner or to affirmatively request the Chancellor to appoint a hearing examiner in their behalf?

STATEMENT OF THE CASE

Defendants-appellants were served with a summons and complaint, but did not initially take any action to oppose this lawsuit since they were opposed to the initiation of these charges against plaintiff-appellant and his suspension. However, on March 18, 1975, defendants-appellants retained counsel for the purpose of representation in connection with any orders which might issue due to plaintiff-appellant's motion for reconsideration. Therefore, defendants-appellants rely on Statement of the Case contained in plaintiff-appellant brief as to events prior to March 19, 1975.

On March 19, 1975, plaintiff-appellant moved orally for reconsideration of the court's March 18, 1975 memorandum. Underlying the court's decision was the adequacy of the administrative process. But the process had ceased due to the resignation of the hearing examiner on or about February 1, 1975. The court accepted new evidence on this point which demonstrated that there was no longer a necessary majority of the Board members who wanted to prosecute the charges any further, and therefore, the Board was unwilling to appoint a new hearing examiner.

On April 3, 1975 the District Court acted on this new evidence. Instead of finding the administrative process inadequate and unconstitutional and, therefore, reinstate plaintiff-appellant to his position, the District Court issued a

Memorandum and Order directing the individual board members to appoint a hearing examiner by April 7, 1975, in the event they fail to do so they were ordered to request the Chancellor to appoint a hearing examiner by April 11, 1975, with such request to be made on or before April 8, 1975.

On April 4, 1975 defendants-appellants moved that the Court stay its order of April 3, 1975 pending the determination of an appeal. By order of April 4, 1975, the court denied defendants-appellants'motion. Whereupon, defendants-appellants filed their notice of appeal. On April 7, 1975, defendants-appellants moved this court to expedite their appeal and stay the District Court's April 3, 1975 Order. On April 8, 1975, this court granted defendants-appellants' motion for an expedited appeal but denied their motion for a stay of the April 3, 1975 order pending appeal. Thereafter Judge Stewart by an order non pro tunc as of April 3, 1975, reaffirmed the court's March 18, 1975 decision and thereby relinquished all jurisdiction over the case.

STATEMENT OF FACTS*

Defendants-Appellants Hoggard, Barreto, Ramos and Wong are duly elected members of Community School Board Number One located on the lower eastside of Manhattan. They were elected in 1974 and ran on the Por Los Niños slate of candidates. They were opposed by a slate of candidates supported by the Committee for Effective Education.

They are nominal defendants in this action since they are not charged with participating in those acts and practices which form the basis of plaintiff-appellant's First and Fourteenth Amendment claims as well as his state law claims. From the begining, they have opposed plaintiff-appellant's suspension and the preferral of charges and the prosecution of those charges against him. Among other things defendants-appellants Board members have continued to assert that the charges against plaintiff-appellant "involve the superintendent's right to free speech and association" and have consistently refused to aid the other defendants in the prosecution. They had, therefore, refused to vote for the preferral of these charges on August 8, 1974. They had on November 4, 1974 and March

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*For a more complete statement of facts defendants-appellants Hoggard, Barreto, Ramos, and Wong rely on the Statement of Facts contained in plaintiff-appellants brief.

17, 1975 refused to vote for a hearing examiner to hear and determine the charges. (Affidavit of Arnold Rothbaum, sworn to on the 25th day of March 1975.) They have also stated that they will not, in the future, proceed with the prosecution of the charges. They have also indicated that they desire the charges be dropped and Mr. Fuentes reinstated. (Affidavit of Georgina Hoggard, sworn to on the 25th day of March 1975.)

Defendant-Appellant Kozlowsky, originally voted for the suspension of plaintiff-appellant and the filing and prosecution of the charges against him. She was a member of a faction of the Board which consisted of five members in 1974. However, on or about the early part of 1975, Mr. Kozlowsky decided that the other members of the five member majority did not share or reflect her educational philosophy, or views as to the best approach to govern the District and educate its children. As a result, she now maintains an independent position on the Board. She is neither a member of the former majority nor the Por Los Niños members. However, there are certain issues with which Ms. Kozlowsky and the Por Los Niños members are in accord, one of which is their desire to reinstate plaintiff-appellant, drop the charges and in general, halt his prosecution. (Affidavit of Carolyn Kozlowsky, sworn to the 20th day of March 1975.)

Despite the fact that these five board members represent an absolute majority on the Board, they are unable to reinstate plaintiff-appellant and drop the charges because defendant-appellant Ramos is out of state indefinitely. They, therefore, can not physically gather the necessary five members to vote in favor of such action as is required by Section 41 of the New York State General Obligations Law. (Affidavit of Arnold Rothbaum, sworn to on the 25th day of March 1975.)

On March 18, 1975, Judge Stewart issued his Memorandum and Order dismissing plaintiff-appellant's complaint in its entirety. On oral motion of plaintiff-appellant for reconsideration, the Court met with counsel to resolve the failure of the Board to appoint a hearing examiner.

The Court looked to the Chancellor of the New York City School District, who is not a party to this action, to resolve the deadlock and appoint a hearing examiner, but the Chancellor was unwilling to act within the time that the District Court believed necessary to protect the rights of the plaintiff-appelant (Transcript of April 2, 1975). As a result, even though the Court was aware that five of nine of the Board members no longer wanted to prosecute the charges, the District Court ordered the Board to appoint a hearing examiner, or, in the event they failed to do so,

to that the Chancellor appoint a hearing examiner by April 11, 1975. (Memorandum and Order of April 3, 1975.) Thereafter Judge Stewart by an order non pro tunc as of April 3, 1975, reaffirmed the Court's March 18, 1975 decision and thereby relinquished all jurisdiction over the case.

ARGUMENT

The District Court was without authority to affirmatively order defendants-appellants Community School Board members to either appoint a hearing examiner or to make an affirmative request to the Chancellor to appoint a hearing examiner on their behalf.

The District Court, without a finding of unconstitutionality, on April 3, 1975, ordered the community school board members of District No. 1 to either appoint a hearing examiner or to request the Chancellor of the New York City Public School System to appoint a hearing examiner to hear and determine the charges preferred against its Community Superintendent. Absent such a finding of unconstitutionality, the federal courts lacked jurisdiction to issue such an order. Board of Regents v. Roth, 408 U.S. 564 (1972); Scheelhaase v. Woodbury, 488 F. 2d 237 (8th Cir. 1973); Lunsford v. Reynolds 376 F.Supp.526 (W.D. Va. 1974)

Assuming, as the District Court did, that "Fuentes has a right to a hearing on the charges," and that that right could be remedied by the Federal Court exercising its "inherent equity" powers, the court, in framing the relief granted, exceeded its equity powers. (Memorandum and Order, April 3, 1974, at p. 3)

On March 17, 1975, the Community School Board, through its

refusal to appoint a hearing examiner, chose not to prosecute the charges preferred against Mr. Fuentes. The Court, therefore, in order to protect Mr. Fuentes' rights and consistent with the Community School Board's decision not to proceed, had no alternative but to order that the charges against Mr. Fuentes be dismissed and that he be reinstated. The court could not order the Board, once it decided not to proceed with the prosecution, to prosecute by directing the individual Board members to appoint a hearing examiner themselves or through the Chancellor.

Moreover, through its April 3, 1975 order the District Court has restructured the administrative process established by state law and contract. In the process Judge Stewart has caused the court to become the prosecutor of the charges preferred against Mr. Fuentes. The District Court, upon its own motion, has chosen to prosecute these charges, despite the fact that the elected school board, in its discretion, has chosen not to prosecute. This the District Court is without authority to do.

The prosecutional situation described herein is analagous to cases arising under the criminal law where prosecutors have failed to prosecute criminal defendants in a timely fashion. In such situations the courts have ordered that the indictments be dismissed and the defendants released. U.S. v. Favaloro, 493 F. 2d 623 (2nd Cir. 1974)

Courts have not, in such cases, ordered the prosecutor to proceed with the indictment or ordered the prosecutor to request that his superior appoint or hire another prosecutor

or to proceed with the prosecution. U.S. v. Favaloro, supra. Here, the District Court was not merely presented with a case in which the prosecutor has failed to prosecute in a timely fashion. On the contrary, the court was faced with a case where the Community School Board, in its idscretion, has chosen, as evidenced by its vote on March 17, 1975, not to prosecute the charges against plaintiff-appellant Fuentes and an absolute majority of the Board has represented to the court that they will not proceed with the charges in the future. They have further stated that they desire the charges be dropped and Mr. Fuentes reinstated. Given this factual situation, the District Court had no alternative but to order that the charges against Mr. Fuentes be dismissed and that he be reinstated.

Furthermore, the District Court through its order has placed defendants-appellants elected school board members in an untenable position. From the beginning, the defendants-appellants have refused to vote to prefer these charges and thereby initiate prosecution, because they considered this prosecution to be in retaliation for plaintiff-appellant's expression of his political beliefs and association protected by the First Amendment to the United States Constitution. The considered that any vote to proceed with this prosecution would be violative of Mr. Fuentes' constitutional rights. The District Court, while declining to reach this constitutional issue, has ordered them, as elected officials to proceed and appoint a hearing examiner. Such an order was clearly an abuse of the Court's discretion.

CONCLUSION

For the foregoing reasons, defendants-appellants respectfully request that this Court reverse and vacate the District Court's order of April 3, 1975 and order that the charges be dismissed and that plaintiff-appellant be reinstated.

ARNOLD ROTHBAUM, ESQ.
260 Broadway
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Attorney for Plaintiff-Appellants
Hoggard, Ramos, Barreto, and Wong.

DATED: April 18, 1975
Brooklyn, New York

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Luis Fuentes,

Plaintiff,

v.

Adolph Roher et al.,

Defendant

Civil Action

No. 75-7213

Affidavit of Service

STATE OF NEW YORK)
: SS:
COUNTY OF KINGS)

ARNOLD ROTHBAUM being duly sworn, says that he served the attached Memorandum of Law upon Carolyn Kozlowsky the defendant herein, on April 18, 1975, by mailing a copy to her at 155 E. 4th Street, New York, New York, defendant's last known address.

ARNOLD Rothbaum

Sworn before me this
18th day of April 1975

Notary Public

CAROL L. ZIEGLER
Notary Public, State of New York
No. 31-4918555
Qualified in New York County
Commission Expires March 30, 1976

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

LUIS FUENTES,

Plaintiff, Civil Action No. 75-7213

v.

Affidavit of Service

ADOLPH ROHER et al.,

Defendant.

STATE OF NEW YORK)
: SS:
COUNTY OF KINGS)

ARNOLD ROTHBAUM being duly sworn, says that he served the attached Memorandum of Law upon Herbert Teitelbaum, attorney for plaintiff, on April 18, 1975, by mailing a copy to him at 95 Madison Avenue, New York, New York, the last known address of attorney for plaintiff.

Arnold Rothbaum

ARNOLD ROTHBAUM

Sworn before me this
18th day of April 1975

Carol L Ziegler

Notary Public

CAROL L. ZIEGLER
Notary Public, State of New York
No. 31-4518555
Qualified in New York County
Commission Expires March 30, 1976

NOTICE OF ENTRY

Sir:- Please take notice that the within is a *(certified)* true copy of a
duly entered in the office of the clerk of the within named court on 19

Dated,

Yours. etc.,

Attorney for

Office and Post Office Address

To

Attorney(s) for

NOTICE OF SETTLEMENT

Sir:—Please take notice that an order

of which the within is a true copy will be presented for settlement to the Hon.

one of the judges of the within named Court, at

on the day of 19

at M.

Dated,

Yours etc.,

Attorney for

Office and Post Office Address

To

Attorney(s) for

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

LUIS FUENTES,
Plaintiff- Appellant,

-against-

ADOLPH ROHER et al.,
Defendants- Appellants.

AFFIDAVITS OF SERVICE

BY MAILING

Arnold Rothbaum
Attorney for Defendants- Appellants
Office and Post Office Address, Telephone Hoggard, Ramos, Yong & Barreto

260 Broadway
Brooklyn, New York 11211

To

Attorney(s) for

Service of a copy of the within

is hereby admitted.

Dated,

.....

Attorney(s) for

Copy received
from Hyatt.
Asst Cop. Counsel
4/18/75 4½ pp